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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1401

BETTY JEAN PINGATORE and DANIEL F. PINGATORE,
Plaintiffs-Appellees,

vs.

MONTGOMERY WARD AND COMPANY, INC.,
Defendant-Appellant,
F.W. WOOLWORTH COMPANY,
Defendant-Appellant.

MONTGOMERY WARD AND COMPANY, INC.,
Cross-Plaintiff-Appellant,

vs.

F. W. WOOLWORTH COMPANY,
Cross-Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Cross-Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Irving Kroll, on behalf of Petitioners, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, is unreported. The opinion of the Court of Appeals for the Sixth Circuit is reported at 419 F.2d 1138.

JURISDICTION

The decision of the Court of Appeals was made and entered on December 18, 1969. A motion for leave to file Petition for Rehearing was granted January 15, 1970. An order denying said Petition for Rehearing was filed on January 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of Rule 28 (a) (2) and 28 (b) of the Rules of Appellate Procedure are set forth:

(a) (2) A statement of the issues presented for review.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a) (1)-(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

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STATEMENT

On January 3, 1962 petitioners were business invitees at respondent's store in the City of Detroit. Petitioner, Betty Pingatore, while engaged in making purchases and exchanging gifts, walked into a breezeway from the store and as she was in the area above described, a rat leaped from the roof of the breezeway and bit her on the knee. She was taken to the hospital and respondent, Montgomery Ward, was informed of where the incident had occurred and what had occurred.

An investigation by the Health Department of the City of Detroit found that rats had been living in the area of the Ward store and that the same was known to Ward, and that the condition, which served as a breeding place for rats had been present for about five or six years.

Petitioner, Betty Pingatore underwent rabies treatments, and during the same she sustained a medical reaction to the same, necessitating further hospitalization, with the result that petitioner developed a numbing and tingling on the right side affecting the arm and leg. After a period of hospitalization, and in time, the right leg became weaker and finally she lost the use of it. She underwent further hospitalization and at the time of trial in 1968, she was unable to effectively use her right arm or right leg.

It was petitioners' contention that she had developed conversion hysteria, a traumatic neurosis and a right hemiparesis (paralysis) involving both the arm and leg. Medical testimony was presented by petitioners to sustain these medical conditions. The medical testimony for defendant-respondent attempted to convey to the jury that petitioner was malingering.

A jury verdict was rendered on February 2, 1968 holding Montgomery Ward solely liable, and assessed damages for the plaintiff-petitioner (wife) in the amount of $126,000, and in favor of the plaintiff-petitioner (husband) in the amount of $25,000, together with interest and costs.

Respondent Ward then filed a Motion for a New Trial, and in support of said Motion filed an Affidavit by respondent's counsel. The matter came on for hearing before the United States District Court for the Eastern District of Michigan, Southern Division, and at that time the contents of said Affidavit, and the allegations made therein, were argued before the Honorable Damon J. Keith, Judge of the United States District Court, and at the culmination of same, said Motion was denied in its entirety.

Subsequent to that Order denying the Motion for New Trial, respondent Ward appealed to the Sixth Circuit Court of Appeals, and in its brief it sets forth the following Statement of the Issues Presented For Review:

1.

Did the district Court commit reversible error in denying defendant Montgomery Ward & Co., Inc. ("Wards") motions for a continuance until plaintiffs, the Pingatores, complied with the district Court's pretrial order of November 1, 1967?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on this issue. (See opinion, p. 21, *infra.*)

2.

Did the District Court commit reversible error in refusing to admit into evidence the medical records of Dr. John Webster, being Ward's proposed Exhibit

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No. 45 (microfilm) and No. 45-A (reproduction of microfilm) and of Dr. V. Y. Kasabach, proposed Exhibit No. 46?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on this issue (See opinion, p. 22, *infra.*)

3.

Did the District Court commit reversible error in charging the jury as to the law over the objections of defendant Wards?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on this issue. (See opinion, p. 22, *infra.*)

4.

Did the many erroneous rulings by the District Judge tend to create in the minds of the jury an atmosphere unfavorable to Wards so that Wards did not receive a fair trial?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on this issue. (See opinion, p. 22, *infra.*)

5.

Did William J. Weinstein, attorney for plaintiffs, and Samuel Garzia, attorney for F. W. Woolworth Company, ("Woolworth") commit misconduct so serious as to entitle defendant Wards to a new trial?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on sub-issues raised in defendant-respondent's brief, but reversed on issue of damages only based on affidavit of defendant-respondent filed in Trial Court, but not listed

as an issue by defendant-respondent. (See opinion, p. 23, *infra.*)

6.

Did the District Court commit reversible error in dismissing the cross-claim of Wards aganst co-defendant F. W. Woolworth Company?

The Court of Appeals for the Sixth Circuit upheld the Trial Court on this issue. (See opinion, p. 26, *infra.*)

7.

Was the verdict of the jury in the amount of $126,000.00 in favor of plaintiff Mrs. Pingatore and in the amount of $25,000.00 in favor of Daniel F. Pingatore excessive?

The Court of Appeals for the Sixth Circuit did not rule on this issue.

In answer to same, petitioners in their brief filed an Answer to those Issues, and the matter was set down for oral argument before the Court of Appeals.

On the 17th day of October, 1969, oral argument was had on the Issues set forth in respondent's brief.

On December 18, 1969 the Sixth Circuit Court of Appeals rendered its opinion and used the following language solely on the issue of damages:

> Due to the intemperate argument of counsel for plaintiffs, the case is reversed and remanded for a new trial solely on the issue of the amount of damages. *Gasoline Products Co. v. Champlin Refining Co.,* 283 U. S. 494, 499 (1931); *Thompson v. Camp,* 167 F2d 733 (C.A. 6, 1948); Annot. 85 A. L. R. 2d 9 (1962) Another trial should not consume as much time since the issue of liability is eliminated.

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A Petition for Rehearing was filed by respondent Ward going solely to the question of liability and a Petition for Rehearing was filed by petitioners as to the granting of a new trial on the issue of damages. On January 15, 1970 an Order overruling the Petition for Rehearing of respondent's counsel was entered by the Sixth Circuit Court of Appeals.

A Motion for Leave to file Petition for Rehearing, with supporting Affidavit, filed by petitioners, was granted. The Court did consider the Petition, but believing it was lacking in merit, on January 28, 1970 it was denied.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because the Sixth Circuit Court of Appeals erroneously interpreted the Rules of Appellate Procedure so as to prevent petitioners from having the opportunity to argue, both in writing and orally, the contentions, allegations and statement made by respondent in an Affidavit filed in support of a Motion for New Trial, which your petitioners had answered fully in argument before the United States District Court, and to the District Court's satisfaction, and which your petitioners contend were erroneous and false in their factual contents, and that by setting forth as a basis for reversal and remanding, the mere Affidavit of counsel, did subvert the intent of the Appellate Rules of Procedure to provide all counsel on appeal with an equal opportunity to present his case before the court.

The decision is in conflict with the established accepted Rules of Appellate Procedure as set forth in Rule 28(a)(2) and 28(b), and the issue is of far reaching import.

1. The Court of Appeals held, in substance, that by reason of the fact that the Affidavit of respondent's counsel, that words, to-wit: "God" and "damit" were used by petitioners' counsel in argument, and that petitioners' counsel had slammed his hand on the counsel table, utilized an empty chair as a personification of the corporate respondent; ripped from the blackboard a piece of paper not in evidence, which had been attached thereto by respondent's counsel and used by him in argument, and that one of the jurors commenced to cry during petitioners' counsel's rebuttal argument, standing by itself is tantamount to evidence. Petitioners' counsel does not deny his responsibility and duty to keep his argument within proper bounds as enunciated in the cases cited by the Court in its opinion. However, petitioners' counsel is vitally concerned with the effect that this may have on the actions of the advocate in the courtroom.

The Appellate Court relied on an Affidavit filed by counsel for respondent, which has interpreted matters completely out of context from their actual occurrence, and has in so doing, made it possible for a case to be tried on appeal upon an affidavit, which was never referred to in argument in the briefs of all parties, rather than upon the trial record itself.

Your petitioners contend that a review of the record, which is not available at this time so that proper page citations can be submitted to the Court, would demonstrate the following:

(a) That respondent's counsel's conduct was replete with misrepresentations to the Court and jury of the law and facts in the case, and that he was constantly reminded that he was erroneously stating facts not testified to by the witnesses.

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(b) That during defendant-respondent's counsel's argument to the jury, he accused the plaintiffs-petitioners' counsel of being in a "conspiracy" with plaintiff-petitioner husband, for the purpose of extracting a large sum of money from his corporate client, to the detriment of the plaintiff wife's health. Petitioners' counsel contends that faced with this type of prejudicial argument, appealing to the basest of emotions and not supported in the record, that petitioners' counsel's appeal to "God" and later in the rebuttal argument said the word "damit", in a sense, did only serve as rightful retribution, cannot, standing by itself, be prejudicial. A mistrial on the grounds of prejudicial remarks of petitioners' counsel, has been held properly denied, wherein it appears that in the colloquy involving the intrical language in the presence of the jury, was occasioned by respondent's counsel, although his remarks may have prejudiced the jury as a matter of fact against one or the other of the parties. *Garfield Memorial Hospital v. Marshall,* 92 App DC 234, 204 F2d 721. The matters thoroughly analyzed in our law and citations are replete upon the same in 99 ALR 2d 551, 560 and 29 ALR 2d 1003.

(c) As to the contention set forth in the Affidavit of respondent's counsel that petitioners' counsel utilized an empty chair as a personification of the corporation, this argument once again is but half the truth.

The trial record will reveal that respondent was represented by two counsel, but that at no time during the trial was there any officer or managing agent of the corporation in the courtroom and at the counsel table. The only persons present, of respondent corporation, were those subpoenaed to the courtroom by petitioners, or those presented by respondents. Once his testimony was completed, the corporate witness would vanish.

Petitioners argued to the jury, in response to respondent's argument that petitioners' counsel and petitioner husband were using petitioner wife as a pawn in order to enrich themselves by taking money from the corporation, that the empty chair symbolized the corporation. To whom could petitioners' counsel have pointed an accusing finger, other than the empty chair?

(d) In final argument respondent's counsel had prepared as an aid in argument, four pieces of paper, which covered an entire blackboard, and had taken one-line sentence excerpts from medical records, which he, hopefully, believed would serve as an attempt to convey to the jury that petitioner wife was a malingerer, and that the paralysis of the right arm and right leg had existed for many years prior to the trial. These papers were not put in evidence, and were prepared by respondent's counsel for the sole purpose of argument. In rebuttal, petitioners' counsel took the one-line sentence and compared it with the exhibit itself, which was in evidence, read to the jury from said exhibits, the total contents of the exhibit, and thus explained to the jury the true intent and meaning of the exhibits in evidence, and then argued that the four pieces of paper prepared by defendant-respondent's counsel were, in effect, half truths. In other words, the one-line excerpt placed on respondent's counsel's paper was a correct quote, but taken completely out of context. This, petitioners submit, was an untruth and cannot be condoned as a proper argument in a courtroom, and rebuttal, by pulling same off blackboard, does not rise to the state of "intemperate argument".

Petitioners contend that the Appellate Court has established a dangerous precedent in reversing a judgment on grounds not set forth by defendant-respondent in its brief as an issue, and not alluded to in oral argument to the Court.

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2. Defendant-respondent's Brief, Issue 5, as it pertains to the argument, raised the following sub-issues:

(a) General Weinstein after warning wore his General's uniform to court. (not reversed for this ground because not a true statement)

(b) Counsel for Woolworth stated to the jury that Woolworth was dragged into the case because Wards said Woolworth should be in it. (not reversed for this ground)

(c) Counsel for Woolworth stated to the jury that Wards' cross-claim against Woolworth has been dismissed by the Court as a matter of law. (not reversed for this ground)

(d) Counsel for plaintiffs stated to the jury that Dr. Gesser and others were added to the case by Wards because Wards was in trouble and needed help. (not reversed for this ground)

(e) Counsel for plaintiffs stated to the jury that Wards conducted a big investigation. (not reversed for this ground)

(f) Court allowed plaintiffs' attorney to tell the jury that case should have been settled without a trial. (not reversed for this ground)

(g) Plaintiffs' counsel fawned on and flattered the jury. (not reversed for this ground)

(h) Counsel for plaintiffs in his argument pointed out to the jury the wealth of the defendant Wards and that he represents two little people. (not reversed for this ground)

At no time, in no place, by written or oral words, did respondent argue as an assignment of error before the Appellate Court, that improper language was utilized by

petitioners' counsel, that there occurred improper argument to an empty chair, or that peitioners' counsel was guilty of improper argument by ripping paper from the blackboard, or that petitioners' counsel's argument to the jury made one juror cry.

The record will further show that during the Motion for a New Trial, the allegation in defendant-respondent's Affidavit that juror #3 was crying because of plaintiffs' counsel's argument, was false. The record in the argument for a new trial before the trial judge shows that respondent's counsel was told by a juror during his post trial investigation, that juror #3 was not crying because of the argument of petitioners' counsel, but rather that she had a physical condition, an allergy or cold which caused occasional tears to come to her eyes, and that this had occurred at times throughout the trial. The Trial Court, after being advised that defendant-respondent's counsel had contacted certain jurors, after the trial, conducted his own investigation. This knowledge by defendant-respondent's counsel, that the trial Court had conducted such an investigation, *was the reason that he did not raise this issue as an assignment of error during argument or in his brief,* (emphasis our own) and yet the Appellate Court, by the mere fact that respondent's counsel's Affidavit was made a part of the Appendix, set forth this occurrence as a basis for arriving at the conclusion that the argument was extremely intemperate, and reversed the judgment on the issue of damages only.

3. The decision of the Appellate Court did violate petitioners' constitutional rights, more particularly the 5th and 7th Amendments. It is in complete contradiction of the Rules of Appellate Procedure, 28 (a) (2) and 28 (b), which enunciate words of direction and not discretion.

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No Assignment of Error having been submitted by the defendant-respondent in regard to the matters contained in its counsel's Affidavit, petitioners accepted the irrebuttal legal presumption that the same were abandoned by respondent's counsel and did not argue same. Petitioners' counsel was further augmented in said belief when, upon oral argument before the Court of Appeals for the Sixth Circuit, respondent's counsel made not one remark, overt or indirect, to the contents set forth in the affidavit of respondent's counsel. More important, the Court did not once inquire, during oral argument, of counsel as to contents of said affidavit. Yet, the Circuit Court of Appeals reversed and said in its opinion:

> The affidavit of counsel for Ward relates to the conduct of plaintiffs' counsel in his closing argument to the jury, as follows. . . . It is obvious that the foregoing argument was extremely intemperate. . . .

There are cases replete with decisions emanating from the District Court to the Appellate Court on such grounds and they are enunciated in USCA 28.1291, note 282.

Petitioners' counsel believes, in his research of the law, that this is a case of first impression before this Honorable Court. Petitioners cannot find another case wherein a decision of the Appellate Court was appealed upon the grounds, that said decision was rendered upon facts and matters not contained in the written brief or oral argument of counsel, contrary to Rule 28 (a) (2) and 28 (b) of the Rules of Appellate Procedure and the United States Constitution, more particularly the 5th and 7th Amendments.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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Dated: March 26, 1970

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APPENDIX A

JUDGMENT

UNITED STATES DISTRICT COURT

Eastern District of Michigan
Southern Division

BETTY JEAN PINGATORE AND DANIEL F. PINGATORE, *Plaintiffs,* v. MONTGOMERY WARD, *Defendant and Third Party Plaintiff,* v. F. W. WOOLWORTH CO. & NEISNER BROS., INC., *Defendants,* v. GREAT SCOTT SUPER MARKETS, INC., S. S. KRESGE CO. & CHARLES GESSER, *Third Party Defendants.*	Civil Action No. 23541

The above-entitled case having come on to be heard for trial before this Honorable Court, and a verdict having been rendered by a jury in favor of plaintiff, Betty Jean Pingatore as against the Montgomery Ward, Inc., an Illinois corporation, in the sum of One Hundred Twenty-six Thousand Dollars ($126,000), and a verdict in favor of F. W. Woolworth Co., a New York corporation, of no cause for action as against Betty Jean Pingatore, and a verdict in favor of Daniel F. Pingatore against Montgomery Ward Inc., an Illinois corporation in the sum of Twenty-five Thousand Dollars ($25,000), and a verdict of

F. W. Woolorth Co., a New York corporation against Daniel F. Pingatore of no cause for action.

It is Hereby Ordered that judgments be entered in the above-entitled cause as follows:

1. A judgment in favor of Betty Jean Pingatore against defendant, Montgomery Ward, Inc., an Illinois corporation, in the sum of One Hundred Twenty-six Thousand Dollars ($126,000), together with her costs and attorney fees, to be taxed, and a judgment in favor of F. W. Woolworth Co., a New York corporation against plaintiff, Betty Jean Pingatore of no cause for action, together with its costs and attorney fees, to be taxed.

2. A judgment in favor of Daniel F. Pingatore against Montgomery Ward, Inc., an Illinois corporation in the sum of Twenty-five Thousand Dollars ($25,000), together with his costs and attorney fees, to be taxed, and a judgment in favor of the F. W. Woolworth Co., a New York corporation and against Daniel F. Pingatore of no cause for action, together with its costs and attorney fees, to be taxed.

Damon J. Keith
United States District Judge

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APPENDIX B

DECISION OF THE COURT OF APPEALS

No. 19347

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

BETTY JEAN PINGATORE AND DANIEL F. PINGATORE, *Plaintiffs-Appellees,* v. MONTGOMERY WARD AND COMPANY, INC. *Defendant-Appellant,* F. W. WOOLWORTH COMPANY, *Defendant-Appellant,* MONTGOMERY WARD AND COMPANY, INC., *Cross-Plaintiff-Appellant,* v. F. W. WOOLWORTH COMPANY, *Cross-Defendant-Appellee.*	**Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.**

Decided December 18, 1969

Before Phillips, Chief Judge, Celebrezze, Circuit Judge, and Taylor, District Judge.*

Taylor, District Judge. This is an appeal by Montgomery Ward and Company, Inc. from a judgment rendered on a verdict of the jury in the amount of $126,000.00

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* Honorable Robert L. Taylor, Chief Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

for Mrs. Pingatore and $25,000.00 for Mr. Pingatore. Plaintiffs, by amendment, made F. W. Woolworth a party-defendant and Ward sued Woolworth by cross-claim. A jury returned a verdict in favor of Woolworth in the original action and the Court dismissed the cross-claim. The trial covered a three weeks' period.

The parties will be referred to in their status in the Court below.

Statement of the Case

On January 3, 1962, Betty Jean Pingatore and her husband, Daniel F. Pingatore, along with their three children, drove to Ward's store at Seven Mile Road and Gratiot, Detroit. Woolworth operated a store in the same shopping center. Mrs. Pingatore went into Ward's store by way of the breezeway in back of the store, leaving the children and Mr. Pingatore in the car. After exchanging some gifts and making purchases, she walked into the breezeway from the store and as she moved aside to let people pass in the aisle of the breezeway, a rat leaped from the roof of the breezeway, got tangled in her skirts and bit her on the knee. She returned to the car and was taken to the hospital by her husband. The accident was reported to policemen at the hospital. After treatment at Saratoga Hospital, she and her husband returned to Ward's store and told a representative of Ward what had happened. Mr. Pingatore showed the representative where the accident occurred.

Health inspectors of the City of Detroit visited the scene of the accident and found that rats had been living under six-inch skids supporting Ward's merchandise. There was no evidence that rats were harbored on the Woolworth property. The rat problem was discovered by Ward in

1960 or 1961 and had existed in the area for about five or six years. Thirty-six or thirty-seven rats had been killed at one time along the breezeway. There were rat tracks or runways of rats under the pallets.

On January 5, 1962, plaintiff's family physician examined her and found a bite mark on her right knee and a scratch below the knee. Conforming to the standard practice in the Detroit area, he began a series of anti-rabies vaccinations. After the seventh injection, a serious reaction, symptomized by redness around the injected area, nausea, and a numbing and tingling in the right side, especially in the arm and leg, developed. The vaccinations were discontinued. Following a short stay in the Receiving Hospital for immediate treatment, plaintiff entered Herman Kiefer Hospital for further treatment of the reaction. Tests, including spinal punctures, only indicated a reaction to the vaccine. However, the numbness continued in the arm and leg, and plaintiff was still able to walk. She returned home and remained there until she could be admitted at St. Johns Hospital. During her three week stay there, her right leg became weaker, and finally she lost the use of it. The St. Johns' diagnosis was rabies vaccine reaction and paralysis in the right side, involving both the arm and leg. Later, she entered Michigan University Hospital, but the condition did not improve. After returning home, she was unable to do normal housework. She re-entered St. Johns Rehabilitation Center complaining of stomach trouble and numbness in her arm and leg. A physical therapist treated her at the Rehabilitation Center.

At the trial she was unable to move her right arm or right leg. In a handwriting demonstration she grasped the pen in the index finger and thumb of her right hand and was able to write as her left hand grasped the right and provided movement.

Plaintiff alleged development of conversion hysteria, a traumatic neurosis and a right hemiparesis involving both the arm and leg. Medical examination showed and plaintiff was told that no organic illness was responsible for the paralysis. Some of the doctors described her condition as conversion hysteria, a neurosis which simulated paralysis of her right arm and leg and the dragging of her foot. One psychiatrist for plaintiff testified that she was not suffering from a neurosis but a psychosis. A doctor for defendant stated she was malingering.

There was testimony by a psychiatrist that he treated her when she was eighteen years of age for anxiety problems When this same psychiatrist examined her shortly after the rat bite of January 3, 1962, he found that she was extremely "anxietous" at that time and had a relatively marked functional loss of the right arm and right leg. She was considerably more "anxietous" at that time than before. This psychiatrist examined and treated her between 70 and 80 times from the date of the rat bite until December, 1967.

Assignments of Error

1. Defendant contends that the District Judge erred in not granting a continuance because plaintiffs failed to give defendant a list of witnesses, their addresses and the subject matter of their testimony in the list that was furnished on December 14, 1967 as required by the pretrial order.

Defendant argues that the complaint charged that Mrs. Pingatore was suffering with "conversion hysteria," but that her trouble was psychotic, which is what the layman would call insanity; that her insanity originated when she was less than 2½ years old; that the opinion of Dr. Breiner

was radically different from her claim of conversion hysteria and failure to comply with the pre-trial order prevented Ward from learning of Dr. Breiner's opinion of long-standing insanity.

Plaintiffs argue that defendant was not prejudiced by their not giving the subject matter of Dr. Breiner's testimony since defendant had obtained all the hospital records pertaining to Mrs. Pingatore long before the trial. Dr. Gass, one of defendant's neurologists, had examined her as late as January 6, 1968 and she had submitted to three medical examinations inaugurated by the defendant since the commencement of the litigation. Also, Dr. Gass had reported to the defendant subsequent to his examination on July 1, 1963 it was possible all of the plaintiff's complaints were purely on a functional or on a traumatic neurosis basis and a psychiatrist's opinion of her condition would be important. Dr. Hartnett, another doctor of defendant, examined her on December 22, 1966 and reported that her right-sided weakness was almost wholly functional or hysterical and that she had a conversion reaction. The testimony of Dr. Breiner was not objected to and he was cross-examined extensively. An adjournment of the case was not requested. He stated that the rat bite and the rabies injections were the precipitating factors that caused the paralysis.

On December 27, 1967, plaintiffs' counsel offered to submit plaintiff to another examination by a psychiatrist.

The question of a continuance addressed itself to the sound discretion of the District Judge. Although the accident occurred on January 3, 1962, the case was not brought to trial until January 10, 1968. Defendant had from December 15, 1967 to January 10, 1968 to discover the testimony of Dr. Breiner. We hold that the District

Judge did not abuse his discretion in denying the motion for a continuance. *Glawe v. Rulon*, 284 F.2d 495 (C.A. 8, 1960).

2. The second assignment of error relates to the exclusion of correspondence by Dr. John Webster, a neurologist who examined Mrs. Pingatore after a referral from Dr. Kasabach, an ear specialist. Proposed Exhibit 45 (microfilm) and 45a (reproduction of microfilm) were of six letters. Proposed Exhibit 46 does not appear in the record, but it contained Dr. Kasabach's copy of Dr. Webster's letter. Dr. Webster was incapacitated, and Dr. Kasabach was dead at the time of the trial. In one letter, Dr. Webster gave a medical history of plaintiff and recommended hospitalization for testing. A second letter summarized the results of the testing. Defendant's counsel read selected parts from the hospital records where the testing was conducted. Since these records were the raw data in Dr. Webster's letters, the claimed error was harmless. 28 U.S.C. §1732; *Glawe v. Rulon*, supra.

3. Ten errors are assigned to the charge which, as supplemented, contains some forty-six pages. We do not deem it necessary to consider each assignment spearately. Although some portions were repetitious, we find no prejudicial error in the charge.

4. Defendant further contends that the District Judge made erroneous rulings which separately or cumulatively created such an unfavorable atmosphere that Ward was denied a fair trial. Only two of these assignments require attention.

(a) Mr. Pingatore testified over objection to the effect that Mrs. Pingatore stated that she was bitten by a rat and pointed out the place where she was bitten. This testimony was only competent on the question of notice of time and place of the accident.

(b) The ruling of the District Judge in limiting Mrs. Pingatore's deposition to impeachment purposes was erroneous. Rule 26(d)(2) permits the deposition of a party to a suit to be used by an adverse party for any purpose at the trial, even though the party was present at the trial and testified orally. 4 Moore's Federal Practice, ¶26.29; *Pfotzer v. Aqua Systems, Inc.*, 162 F.2d 779 (C.A. 2, 1947); *Merchants Motor Freight Inc. v. Downing*, 227 F.2d 247 (C. A. 8, 1955). The error was harmless because the material matters developed in the deposition were covered by other evidence in the record.

5. Many errors are assigned to the argument of plaintiffs' counsel, some of which appear to have merit. We recognize that the District Judge has wide discretion in ruling on objections to arguments and that ordinarily his discretion will not be disturbed unless abused. *Hockaday v. Red Line*, 174 F.2d 154 (C.A.D.C., 1949).

The affidavit of counsel for Ward relates to the conduct of plaintiffs' counsel in his closing argument to the jury, as follows:

> "1. When shouting the word 'God' and 'damit' and several other times he would bend over and slam the flat of his hand on the counsel table with great force and emphasis, which made a loud noise and aroused and excited the jury.
>
> "2. He placed an empty chair in front of the jury with the chair facing the jury and shouted 'where is the corporation today?'
>
> "3. While shouting charges he pointed an accusing finger at the empty chair and at the attorney for Wards.
>
> "4. In a dramatic manner he ripped down from the blackboards, crumpled up and threw on the table be-

> hind the blackboards four large sheets of paper, each 36" x 28", taped there with scotch tape by Wards' attorney during the closing argument of Wards' attorney, which large sheets of paper contained a brief chronological medical history, in large hand printed letters, of plaintiff * * *"

Affiant further stated that Juror No. 3 "was crying during the last part of Mr. Weinstein's closing rebuttal argument."

It is obvious that the foregoing argument was extremely intemperate. Curse words have no place in the courtroom. Reference to Ward as a corporation and a large organizationo and placing a chair facing the jury and shouting "Where is the corporation today?" was calculated to prejudice the minds of the jury against Ward. Tearing sheets of paper used by opposing counsel in argument and crumpling them while dramatically saying "lies" was deplorable. Counsel's duty is to keep his argument within proper bounds. *Palmer v. Miller,* 145 F.2d 926, 932 (C.A. 8, 1944).

The Supreme Court has not tolerated such conduct. In the words of Mr. Justice Stone:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See Masterson v. Chicago & N.W. Ry. Co., 102 Wis. 571, 574; Gulf, Colorado & S.F. Ry. Co. v. Butcher, 83 Tex. 309, 316; Tucker v. Henniker, supra, at 322; Monroe v. Chicago & Alton R.R. Co., 297 Mo. 633, 644. The failure of the trial judge to sustain petitioner's objection or otherwise to make certain that the jury would dis-

regard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See Hall v. United States, 150 U.S. 76, 81; Graves v. United States, 150 U.S. 118, 121; Wilson v. United States, 149 U.S. 60, 68. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial." *N.Y. Central R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1929).

In the case of *Brown v. Walter*, 62 F.2d 798 (C. A. 2, 1933), Judge Learned Hand, in reversing the trial court for permitting improper argument of counsel for plaintiff, said in part:

". . . He argued with much warmth that the whole defence had been fabricated by the insurer—transparently veiled by such provocative phrases as an 'unseen hand,' and an 'unseen force,' and the like. This had not the slightest support in the evidence; it was unfair to the last degree. Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defence. A judge, at least in a federal court, is more than a moderator; he is affirmtively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend

upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge." pp. 799, 780.

See: *London Guarantee & Accident Co. v. Woelfle,* 83 F.2d 325 (C.A., 8, 1936); *Chicago & N.W. Ry. Co. v. Kelly,* 84 F.2d 569 (C. A. 8, 1936).

The jury found in favor of Woolworth Company, thus finding that Woolworth did not violate any duty owed to the plaintiffs. The jury found that Ward did violate a duty owed to the plaintiff. Both Ward and Woolworth were charged as joint tortfeasors. The only claim that Ward would have against Woolworth would be for contribution. There is no claim for indemnity. The jury freed Woolworth from any obligation to pay contribution. The District Judge did not commit reversible error in dismissing Ward's cross-claim.

There is substantial evidence to support the verdict of the jury on the question of liability, and this phase of the case is affirmed.

Due to the intemperate argument of counsel for plaintiffs, the case is reversed and remanded for a new trial solely on the issue of the amount of damages. *Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494, 499 (1931); *Thompson v. Camp,* 167 F.2d 733 (C. A. 6, 1948); Annot., 85 A.L.R. 2d 9 (1962). Another trial should not consume as much time since the issue of liability is eliminated.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

No. 19,347

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

BETTY JEAN PINGATORE AND
DANIEL F. PINGATORE,
Plaintiffs-Appellees,
v.
MONTGOMERY WARD AND COMPANY, INC.
Defendant-Appellant,
F. W. WOOLWORTH COMPANY,
Defendant-Appellant,
MONTGOMERY WARD AND COMPANY, INC.
Cross-Plaintiff-Appellant,
v.
F. W. WOOLWORTH COMPANY,
Cross-Defendant-Appellee.

Decided January 28, 1970

Before Phillips, Chief Judge, Celebrezze, Circuit Judge, and Taylor, District Judge.*

Appellees, Betty Jean Pingatore and Daniel F. Pingatore, have presented a motion for leave to file petition

*The Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

for rehearing, with supporting affidavit. The motion is granted.

Having considered the petition for rehearing and believing that it is lacking in merit, it is, therefore, Ordered that the petition for rehearing be, and same hereby is, denied.

Entered by order of the Court.

Carl W. Reuss
Clerk